

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAY 14 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0031-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
STERLING DEVON MOORE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20062255

Honorable Catherine M. Woods, Judge

REVIEW GRANTED; RELIEF DENIED

Jill E. Thorpe

Tucson
Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Following a jury trial, petitioner Sterling Moore was convicted of transportation of marijuana for sale. The trial court sentenced him to a substantially mitigated three-year prison term. We affirmed Moore’s conviction and sentence on appeal. *State v. Moore*, No. 2 CA-CR 2008-0331 (memorandum decision filed March 1,

2010). In March 2011, Moore filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.

¶2 Between July and November 2011, the trial court granted Moore’s attorney four extensions of time to file the petition for post-conviction relief, the last of which imposed a due date of January 6, 2012. In its ruling granting Moore’s third request, the court noted it “is unlikely to grant another extension to Defendant absent a showing of extraordinary circumstances”; the court nonetheless found such circumstances existed based on the fourth request. Counsel failed to file a petition by the January 6, 2012, due date and, on January 20, 2012, the court summarily dismissed the notice,¹ noting the repeated extensions it had granted and commenting that Moore “did not timely request or receive any further extension.”

¶3 On January 23, 2012, three days after the trial court had ruled, and seventeen days after the petition had been due, Moore filed a fifth extension, followed by a motion for reconsideration filed on January 26, asking the court to reconsider its ruling dismissing the notice of post-conviction relief and to incorporate his fifth extension request. In a January 30 ruling, filed on February 2, 2012, the court denied the fifth request, noting Moore had “failed to timely file his request for yet another extension, and [had] failed to present sufficient legal or factual grounds or good cause for the Court to grant the fifth extension.” Also on February 2, counsel filed a supplement to the January 26 motion for reconsideration, attaching as an exhibit an affidavit signed by Moore on

¹Although the court “denied” post-conviction relief in its January 20, 2012, ruling, it is clear it intended to dismiss the notice of post-conviction relief.

February 1, 2012. In a March 26, 2012 ruling, the court denied the motion for reconsideration, as supplemented, and affirmed its prior ruling denying Moore's fifth extension request. Moore now seeks review of the court's dismissal of his notice of post-conviction relief, the denial of his fifth motion to extend the time to file a petition for post-conviction relief, and the denial of his motion to reconsider those decisions.² "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶4 In his petition for review, Moore argues he should be permitted to file a petition for post-conviction relief, stating his computer problems constituted "extraordinary circumstances" meriting a fifth and untimely extension, and that "some of the general delay in this Rule 32 was in part due to trial counsel not responding to efforts by [Rule 32] counsel to schedule an interview." The trial court's orders clearly set forth the history of these proceedings, and we find no fault with the court's analysis. Rule 32.4(c)(2), requires a "showing of extraordinary circumstance" for successive extensions of time to file a petition for post-conviction relief. As already noted, absent an abuse of discretion, we will not interfere with the court's ruling.

²Counsel asserts "[n]o ruling has been forthcoming on the . . . Motion for Reconsideration or the Supplement to the Motion for Reconsideration, although counsel assumes it was subsumed by the court[s] previous two rulings." Although the trial court had not ruled on those pleadings when Moore filed his petition for review, it subsequently did so, and that ruling is part of the record on review.

¶5 Moore did not request an additional extension until weeks after the January 6 due date had passed, offering as an excuse for his untimely request that counsel and Moore had been unable to communicate because Moore’s “computer was sick” and counsel’s facsimile machine was not working properly. To the extent Moore argues on review that counsel “could not” have requested an extension before the January 6 due date because she had lost contact with Moore, this does not explain why counsel did not, at the very least, notify the trial court she was unable to locate her client and would not be able to file a petition by the due date. Notably, counsel requested the first four extensions either on or before the respective due dates in those instances. Based on the record before us, Moore has failed to sustain his burden of establishing the court abused its discretion in summarily dismissing his notice of post-conviction relief, and in denying his fifth motion to extend and the motion to reconsider those rulings. Accordingly, although we grant review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge